Supreme Court, U.S.
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No. 03-1567

In The Supreme Court of the United States

PETER T. MYERS,

Petitioner

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a composer and member of ASCAP, the performing rights licensing organization, believed that ASCAP had improperly calculated his royalties for performances of his music. Petitioner availed himself of plenary hearings before an internal peer grievance body and an independent arbitration panel, both of which concluded that ASCAP had not acted improperly and rejected Petitioner's claims. On ASCAP's motion to confirm the arbitrators' award, the Southern District of New York (Hon. William C. Conner) also agreed that not only ASCAP, but also the arbitration panel had acted properly. Petitioner filed a timely appeal from the district court's decision, but he failed to file the case management forms required by the Court of Appeals' Civil Appeals Management Plan. In consequence, the appeal was dismissed and a motion to reinstate and file the forms late -- filed more than two months after dismissal of the appeal -- was denied. On this record, the questions presented by the Petition are as follows:

Did the United States Court of Appeals for the Second Circuit properly dismiss Petitioner's appeal, and deny his motion to reinstate, because he failed to file the forms required by the Court's local rules concerning docket management and pre-argument conferences?

Does Fed. R. App. P. 47(a)(2) apply to the enforcement of local rules affecting docket management, pre-argument conferences and timely filings, or is its proscription limited on its face to matters of form, *e.g.*, the appearance of briefs and appendices?

RULE 29.6 STATEMENT

Respondent, American Society of Composers, Authors and Publishers ("ASCAP"), is a voluntary unincorporated membership association organized under the laws of the State of New York. ASCAP has no parent companies or subsidiaries.

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STATEMENT OF THE CASE

The Parties

Respondent, American Society of Composers, Authors and Publishers ("ASCAP"), a performing rights licensing organization, licenses the non-dramatic public performances of its members' copyrighted musical compositions, collects license fees from music users and distributes royalties to its members on account of performances of the members' music. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). For more than sixty years, ASCAP's activities have been governed largely by a series of consent decrees entered in the Southern District of New York in *United States v. ASCAP*, 41 Civ. 1395; 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941); 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. March 14, 1950) (hereinafter referred to as the "1950 Decree"); 1960 Trade Cas. (CCH) ¶ 69,612 (S.D.N.Y. Jan. 7, 1960) (hereinafter referred to as the "1960 Order"); 2001-02 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. June 11, 2001). Until they were vacated effective September 11, 2001, the 1950 Decree and the 1960 Order together limned virtually all aspects of the relationship between ASCAP and its members, prescribing the manner in which members' royalties were to be calculated and establishing the grievance machinery to be employed by members who believed that ASCAP had erred in calculating or distributing royalties. This case arose while the 1950 Decree and the 1960 Order were still in effect. The district court had retained jurisdiction over the case pursuant to Section XVII of the 1950 Decree.

Petitioner, Peter T. Myers, is a composer and member of ASCAP. Petitioner is primarily a composer of background music for television series.

The Dispute Between Petitioner and ASCAP

Petitioner composed some 200 musical cues for episodes of "Diagnosis Murder," a popular television series that aired for eight years on the CBS Television Network and today is still in syndication. In accordance with ASCAP's distribution rules — in particular, the Weighting Rules and Weighting Formula (attached to the 1960 Order) that define and assign different values to different kinds of musical performances, e.g., feature, theme, background, and jingle — ASCAP classified performances of Petitioner's musical cues for various episodes of "Diagnosis Murder" as "background" performances and paid royalties accordingly. Petitioner objected, claiming that each performance should have been classified as a more valuable "feature" performance. As a result, Petitioner claimed that he was entitled to an additional $600,000 in royalties. ASCAP refused to reclassify the performances or to pay Petitioner any additional royalties.

The Ascap Dispute Resolution Machinery and Related Proceedings

A. The ASCAP Board Of Review

As required by the 1960 Order and ASCAP's other governing documents including its Articles of Association, when ASCAP's staff rejected Petitioner's initial claim, he brought his grievance against ASCAP in the form of a "protest" before ASCAP's Board of Review, an internal peer grievance body composed of members of ASCAP elected by the membership at large. *Cf. United States v. ASCAP, In re Protest of Richard Lewis* Warren, 129 F. Supp. 2d 327, 328-329 (S.D.N.Y. 2001). On Septembe

26, 2001, following a plenary hearing, the Board of Review denied Petitioner's protest.

B. The Proceeding Before the Panel

Again as prescribed by the 1960 Order, Petitioner appealed to a panel of three arbitrators appointed by the American Arbitration Association (the "Panel"). *Cf. United States v. ASCAP, In re Application of Steve Karmen*, 914 F. Supp. 52, 53-54 (S.D.N.Y. 1996). The Panel reviewed all evidence submitted to the ASCAP Board of Review, conducted a hearing and, on July 18, 2002, issued an arbitration award affirming the Board of Review's decision.

C. The Proceeding In California State Court

On October 18, 2002, Petitioner filed a petition in the Superior Court of California, County of Los Angeles, asking that court to vacate and reverse the arbitration award. ASCAP moved to dismiss the California proceeding. That court granted ASCAP's motion on March 17, 2003, deferring to the New York federal court on the ground of improper forum.

D. The District Court Proceeding

On November 27, 2002, ASCAP moved in the District Court for the Southern District of New York under the 1960 Order and the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) for an order confirming the arbitration award. On June 4, 2003, the district court (Hon. William C. Conner) granted ASCAP's motion and confirmed the award (the district court's decision is Appendix E to Petitioner's Petition for a Writ of Certiorari, Petition at App. 35).

E. The Appeal

On June 20, 2003, Petitioner filed his appeal and paid the requisite docketing fee. On July 18, 2003, Petitioner filed his Notice of Appeal Acknowledgment letter.

On November 18, 2003, the Court of Appeals, acting *sua sponte*, dismissed the appeal because of Petitioner's failure to file Form C ("Civil Appeals Pre-Argument Statement") and Form D ("Court of Appeals Transcript Information") as required by Rule 3 of the Court of Appeals' Civil Appeals Management Plan ("CAMP"). Rules of the Second Circuit Court of Appeals, Appendix, Part C. On the same date, the Clerk of the Court issued a certified copy of the dismissal Order and notified counsel of record of the Order.

On January 27, 2004, Petitioner filed a motion to reinstate the appeal and to file Forms C and D late on the ground of "excusable neglect." On February 13, 2004, the Court of Appeals (Hon. Rosemary P. Pooler) denied the motion. The Petition for Writ of Certiorari followed.

On this record and for the reasons stated below, the Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

The Court Of Appeals Has The Authority To Establish Rules For Managing Its Docket And To Impose Sanctions For Failure To Comply With Those Rules

There can be no dispute that the courts of appeals have the authority to make and amend local rules governing practice before the courts and managing their dockets. 28 U.S.C. § 2071 and FED. R. APP. P. 47. Many local rules address case management, and for good reason. The courts of appeals (as well as most district courts) are struggling to handle ever-increasing caseloads. As a consequence, these courts have turned to stricter scheduling controls and innovative pre-argument procedures to foster settlement, both as a means of reducing docket congestion.

In this connection, the Court of Appeals for the Second Circuit established its Civil Appeals Management Plan ("CAMP"). Rules of the Second Circuit Court of Appeals, Appendix, Part C. The guide to the operations of the Second Circuit, formally titled "Everything You Wanted To Know About The Second Circuit" (prepared by the Clerk's office) and informally referred to as the "Second Circuit Handbook," notes:

> CAMP promotes speedy and deliberate justice in civil appeals by effecting tight scheduling controls and providing a forum that fosters settlement and consensual resolution of procedural disputes. It allows parties to arrange creative and flexible solutions in an informal and private setting.

Everything You Ever Wanted To Know About The Second Circuit, found at http:// www.ca2.uscourts.gov.

Through its CAMP, the Second Circuit also implements the mandate of Fed. R. App. P. 33:

> The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.

FED. R. APP. P. 33.

Critical to its CAMP is Form C, the Second Circuit's "Civil Appeal Pre-Argument Statement," which is provided to counsel by the district court clerk at the time the Notice of Appeal is filed. When completed, Form C provides the basis of jurisdiction, describes the nature of the action and the result below, states the issues on appeal, and furnishes other information relevant to the pre-argument conference. Rule 3 of the CAMP requires that within ten calendar days after the filing of a Notice of Appeal, the appellant shall file Form C with the Clerk of the Court of Appeals. The Second Circuit Handbook states in no uncertain terms:

> **Failure to timely file Form C... will result in dismissal.** (Boldface original).

Everything You Ever Wanted To Know About The Second Circuit, found at http:// www.ca2.uscourts.gov.

Form D, the Second Circuit's "Civil Appeal Transcript Information," is also provided to counsel by the district court clerk at the time the Notice of Appeal is filed. It informs the Court whether a transcript has been ordered. In conformity with Fed. R. App. P. 10(b), Rule

3(b) of the CAMP requires that a transcript must be ordered within ten calendar days after the filing of the Notice of Appeal or an appellant must explain why a transcript is not ordered. The Second Circuit Handbook states:

> Form D must be completed and filed at the same time as Form C or the case will be dismissed. **Form D must be filed even if a transcript is not ordered.** (Boldface original).

Everything You Ever Wanted To Know About The Second Circuit, found at http:// www.ca2.uscourts.gov.

Petitioner's counsel did not deny that he was familiar with the CAMP and the Second Circuit Handbook (he cited to it in his brief below); that he received Forms C and D from the district court clerk when the appeal was filed; or that he failed to file the Forms within the period prescribed by the local rules. He blamed his law firm -- specifically, his firm's calendaring system -- and argued that his failure to file constituted excusable neglect. Declaration of Alan I. Cyrlin, Petition, Appendix D at App. 15.

It is well-settled, however, that parties and their counsel who fail to follow the clear dictates of a court rule cannot claim excusable neglect in the ordinary course. In *Pioneer Inv. Servs. Co. v. Brunswick Ass'n Ltd. P'ship*, 507 U.S. 380 (1993), this Court set forth the factors to be considered in evaluating excusable neglect:

> . . . [1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

507 U.S. at 395.

The Second Circuit has determined that three of the *Pioneer* factors (factors 1, 2, and 4) ordinarily will favor the party seeking an extension, but it and other circuits have focused on the third factor in finding that "the equities will rarely if ever favor a party who 'fails to follow the clear dictates of a court rule'" and in holding that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test." *Silivanch et al. v. Celebrity Cruises Inc. et al.*, 333 F.3d 355, 366-67 (2d Cir. 2003) (citing *Canfield v. Van Atta Buick / GMC Truck, Inc.*, 127 F.3d 248, 250-51 (2d Cir. 1997) (per curiam) (*cert. denied*) 522 U.S. 117 (1998). Applying the *Pioneer* test to Petitioner's failure to comply with the CAMP requirements for the timely filing of Forms C and D, the Second Circuit properly concluded that there was no excusable neglect and that the sanction of dismissal was wholly warranted.[1]

Indisputably, the Court of Appeals has the authority to establish rules for managing its docket and to impose sanctions, including dismissal, for non-excusable failure to comply with those rules. The Circuit Court properly exercised that authority when it dismissed Petitioner's appeal and denied his motion for reinstatement.

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1 Petitioner has not been denied the right of appeal, as he suggests. Petitioner's Brief at 8. Rather, Petitioner exercised his right of appeal, but failed to perfect his appeal in the manner prescribed by the local rules of the Second Circuit. And the cases he cites, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) and *Catlin v. United States*, 324 U.S. 229 (1945), are inapposite. In both cases, this Court affirmed the circuit courts' dismissals of appeals on the ground that the orders appealed from were not final judgments. That was not the case here.

II.

On Its Face, Fed. R. App. P. 47(a)(2) Applies Only To Local Rules Imposing Requirements Of Form And Not To Rules Dealing With More Critical Matters Like Docket Management, Pre-Argument Conferences And Timely Filings

Petitioner is reduced proverbially to trying to force a square peg into a round hole. He cannot do so.

Fed. R. App. P. 47(a)(2) provides as follows:

> A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement.

FED. R. APP. P. 47(a)(2).

In practical terms, the Rule prohibits courts of appeals from dismissing appeals because of a party's non-willful failure to comply with a local requirement of form, *e.g.*, the appearance of briefs and appendices. Put another way, injustice may be avoided by preventing dismissal of an appeal on account of an appellate court's refusal to accept a brief or appendix as timely filed because of errors in form. That is simply not the same as having an appeal dismissed for failing to file a brief or required form timely—or at all.

If Petitioner had filed Forms C and D timely but had his forms rejected for typographical errors and, consequently, had his appeal dismissed for failing to file the forms timely, he might have an argument under Fed. R. App. P. 47(a)(2). But he simply failed to file, and that

is not a mere matter of form. The Advisory Committee Notes on the Rule support this conclusion:

> Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn—covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. *Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.*

FED. R. APP. P. 47(a)(2) advisory committee's note. (Emphasis added.)

We submit that matters of docket management, scheduling of pre-argument settlement conferences based on salient information, and more to the point, timely filing of prescribed documents -- even though they may require filing of "forms" -- are clearly not "mere matters of form." Petitioner cannot escape the consequences of his failure to comply with the Second Circuit's clearly expressed local rules by a misplaced reliance on Fed. R. App. P. 47(a)(2).

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,
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